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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 251

ANGELIKA L. SCHNEIDER, *Petitioner*,

v.

DEAN RUSK, individually, and as Secretary of State, *Respondent*.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

Petitioner, in its principal brief, has shown that Section 352(a)(1) of the Immigration and Nationality Act of 1952, pursuant to which petitioner is sought to be deprived of her citizenship fails to meet constitutional standards principally for two reasons.

(1) It violates the Fifth Amendment because it discriminates between petitioner and other citizens of the United States on the sole basis that petitioner acquired her citizenship by naturalization rather than by birth. This discrimination, as pointed out in petitioner's principal brief, affects fundamental personal rights and is contrary to the basic American proposition that all

citizens, regardless of national origin, must be treated equally.

(2) Even if it were not discriminatory the challenged legislation violates due process because it is arbitrary. Congress can provide for the withdrawal of American citizenship only in cases where the citizen commits an act inconsistent with his American citizenship. Mere residence abroad is, of course, not inconsistent with American citizenship, and has not been so regarded by Congress so far as native-born citizens are concerned.

The principal argument the Government advances to the contrary is that the residence abroad of naturalized citizens may raise problems in the conduct of foreign affairs and cause administrative difficulties. Therefore, the Government urges, Congress may terminate the citizenship of naturalized citizens residing abroad even though such residence is an act in no way inconsistent with American citizenship. Further the Government suggests the residence abroad of naturalized citizens is inconsistent with American citizenship because naturalized citizens who reside abroad may reasonably be regarded to have abandoned their allegiance to the United States. As shown below, these suggestions violate the Fifth Amendment.

SUMMARY OF ARGUMENT

The Government erroneously assumes that Congress has the power to expatriate citizens as a means of solving administrative problems. But the cases of *Mackenzie*, *Savorgnan* and *Perez* show that Congress can constitutionally compel expatriation of a citizen only for an act which is inconsistent with American citizenship. Residence abroad is clearly not such an act, as shown by the facts in this case, and by the

failure of Congress to make residence abroad an expatriating act for native-born citizens.

Nor can Congress substitute for an act inconsistent with allegiance to this country a conclusive presumption that naturalized citizens residing abroad *as a group* have abandoned their allegiance to the United States.

Underlying that contention, and running through the Government's entire brief, is the assumption that naturalized citizens as a class are less loyal than the native-born and are therefore more likely to abandon their allegiance to the United States. Not only is this assumption unwarranted, but it is completely contrary to the constitutional requirements of due process. Congress may attach to a particular *act* connoting lack of allegiance the consequence of expatriation. But Congress may not enact legislation on the theory that one group of citizens—*as a group*—is more likely to lack allegiance than another. Group legislation, particularly when based on such factors as national origin, is not permitted under the Constitution. See *Hirabayashi* v. *United States*, 320 U.S. 81, 100.

Congress cannot create a class of citizens of probation or subject to special restrictions on the basis of the means by which they acquired their citizenship. Once a person has become a citizen of the United States, be it by birth or naturalization, his rights as a citizen are the same as those of every other citizen.

The Government urges that the legislation attacked is an appropriate means to deal with foreign affairs problems caused by the residence of naturalized citizens in the country of their origin because that country might make demands on them. The Government relies

principally on the diplomatic history of the middle of the last century when naturalized citizens were being drafted into military service by the countries of their former nationality. But these problems were no longer existent when Congress enacted the challenged legislation in 1940 and were not the basis for this legislation.

Congress enacted this legislation, as the legislative history indicates, not because it felt that naturalized citizens residing abroad caused more problems than native-born, but rather because it felt that many naturalized citizens were nominal citizens who had no real attachment to the United States. On this basis, however, the challenged legislation cannot be sustained because it assumes such a conclusion is applicable to all naturalized citizens living abroad regardless of the allegiance of the individual naturalized citizen to which it applies.

Congress was required to deal with actual problems and to limit its measures to such as might be appropriate to deal with such problems. *Perez* v. *Brownell*, 356 U.S. 44; Cf. *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349.

The problems which the Government says may attend residence abroad of naturalized citizens are all problems of a special and limited character which could be dealt with by specific legislation (perhaps even in some cases withdrawing citizenship) without restricting broadly the rights of naturalized citizens.

Such problems may arise when a nation does not recognize American naturalization. But as the Government concedes almost all nations, including Germany where petitioner resides, recognize American naturalization. The problem of the country which does

not could undoubtedly be dealt with by specific legislation applicable only to residence in such a country. The existence of such a problem cannot justify removing citizenship in cases and countries where no such problem exists.

The Government further seeks to support the legislation as a measure designed to reduce the problem of dual nationality. This, however, is not a problem limited to naturalized citizens. Children of native-born citizens in the same situation as petitioner are also dual nationals.

I. Congress Has No Power to Terminate Citizenship to Ease Governmental Burdens and Responsibilities But Can Expatriate Only for Acts Inconsistent With the Retention of American Citizenship

Petitioner submits that Congress simply does not have the power to deal with purported problems and difficulties attending the residence abroad of naturalized citizens by expatriation. The Congressional power to expatriate is clearly limited to acts which are inconsistent with the continuing retention of American citizenship. Residence abroad is not that kind of an act.

The basic error in the Government's argument is that it assumes Congress has the power to terminate citizenship in order to ease governmental burdens and responsibilities.

Citizenship is not a right which may be freely sacrificed to governmental expediency. Once a person becomes a citizen, be it by birth or naturalization, that person is made an integral part of the body politic. The Government is committed to that citizen even if his citizenship should become a matter of embarrassment or difficulty. In return the citizen owes allegiance to

his country and is obligated to perform whatever duties of citizenship may properly be imposed on him no matter how difficult or embarrassing it may be to him. As this Court stated in *Luria* v. *United States*, 231 U.S. 9, 22:

> "Citizenship is a membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other. . . ."

So long as the citizen maintains allegiance he is entitled to his citizenship and also in most cases to have his country protect him, even if this should be troublesome to its officials. Petitioner's residence in Germany is of course in no respect embarrasing to this country.

A citizen may be deprived of his citizenship, as the decisions of this Court clearly demonstrate, only if he performs an act which reasonably may be deemed to be inconsistent with allegiance to this country. Such an act may be either the acquisition of a foreign citizenship or the performance of an act which shows such a degree of commitment to the political affairs of the foreign country that it may be deemed to be inconsistent with American citizenship. Residence abroad is, of course, not an act of this character.

There are only three cases in which this Court has sustained the withdrawal of citizenship under a statute. *Mackenzie* v. *Hare*, 239 U.S. 299, *Savorgnan* v. *United States*, 338 U.S. 491 and *Perez* v. *Brownell*, 356 U.S. 44. In *Mackenzie* and *Savorgnan* the expatriating act was one through which the citizenship of a foreign country was acquired. In *Perez* the act was one which the majority deemed to be inconsistent with

allegiance to the United States. Never has this Court sustained the withdrawal of citizenship on the basis of an act plainly consistent with American allegiance—such as mere residence abroad. Indeed, as petitioner's principal brief points out under II, *Perez* made clear that Congress was held to have the right to attach loss of citizenship to the act of voting there involved only because the Court believed the act could reasonably be regarded as establishing lack of allegiance to the United States.

In *Mackenzie* v. *Hare*, 239 U.S. 299, decided in 1915, the Court upheld the constitutionality of a statute which provided that an American woman who married a foreigner "shall take the nationality of her husband" and lose her American citizenship during coverture. At the time this case was decided a woman who married a foreigner became thereby a citizen of the husband's country.[1] Marriage to a foreigner at the time of this decision meant therefore the acquisition of a foreign citizenship. For this reason marriage to a foreigner was held to be inconsistent with the retention of American citizenship. Furthermore, the statute in *Mackenzie* deprived a married woman of her citizenship only during the existence of her marriage.

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[1] This was not only the law in the United States, but as counsel for Mrs. Mackenzie admitted "England and Continental countries have held for a long time to the doctrine of the merging of the identity of the wife with that of her husband. Under such a doctrine a wife was held not to have a citizenship separate and apart from that of her husband. (60 L. Ed. 298).

The statute involved in *Mackenzie* was repealed, perhaps in response to the command of the Nineteenth Amendment, by the Cable Act of 1922. 42 Stat. 1021.

Petitioner's marriage did not under either American or German law give her German citizenship or take away her American citizenship.

Upon its termination she was restored her rights of citizenship. This case has no application here since concededly neither petitioner's marriage nor her subsequent residence abroad made her a German national.

In *Savorgnan* v. *United States*, 338 U.S. 491, this Court upheld a statute attaching the withdrawal of United States citizenship to the act of becoming naturalized in a foreign country. Petitioner in that case acquired Italian citizenship and took an oath of allegiance to the King of Italy. This was clearly inconsistent with allegiance to the United States. Her principal defense was that even though she voluntarily acquired Italian citizenship, she did not do so with the intention of giving up her allegiance to the United States. This defense was rejected because expatriation is based upon the performance of an objective act and does not depend on the subjective intention with which such an act was performed. Here there is no inconsistent objective act like the oath of allegiance to the Italian King in *Savorgnan*, but rather only residence abroad which is consistent, as we have seen, with continued allegiance to the United States. Petitioner refers to the fact that she regards herself to be as an American simply to demonstrate that a citizen may reside abroad and yet remain loyal to his country. It is a meaningful statement of allegiance where the objective evidence, *i.e.*, refusal to take German nationality, supports the declaration and does not, like the oath of allegiance to th Italian King in *Savorgnan*, contradict it.

This Court's recent decision in *Perez* v. *Brownell*, 356 U.S. 44, has been analyzed in some detail un r Point II of our principal brief. There this Court, in a 5-4 decision, held that Congress, pursuant to its for-

eign affairs power, could take away the citizenship of a person who voluntarily voted in a foreign political election. The majority of the Court upheld the constitutionality of the statute because it felt that voting in a foreign political election could reasonably be held to connote both a lack of allegiance to the United States and allegiance to a foreign country. The minority dissented on the ground that voting in a foreign political election was not an act from which Congress could reasonably imply abandonment of American citizenship. There can, we submit, be no such difference of opinion with respect to the act of residing abroad. It is plainly consistent with continued allegiance to the United States.

Perez was the first case in which this Court has held that Congress may attach expatriation to an act which does not constitute an express renunciation of American citizenship by the acquisition of citizenship in a foreign country. In both *Mackenzie* and in *Savorgnan*, as we have seen, the citizen who was held to have expatriated himself had acquired a foreign nationality by the very act which was the basis of the expatriation. In *Perez* the majority held Congress could attach loss of citizenship to an act not resulting in the acquisition of foreign nationality if the act in question may be deemed inconsistent with American citizenship. Residence abroad plainly is not an act of this kind. Indeed, if it were Congress would surely have made residence abroad an expatriating act whether performed by a naturalized or native-born citizen.[2]

[2] The Government (Br. 14, n. 7, Br. 32, n. 20) cites the dissenting opinion of Judge Edgerton in *Lapides* v. *Clark*, 176 F. 2d 619 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 860, as authority for the proposition that residence abroad may be made an expatriating act. Judge Edgerton held that the legislation was unconstitutional because it

The limit on Congressional power in this field defined in *Perez* is, we submit, vital to the protection of the most basic personal rights from governmental intrusion. To permit Congress to expatriate only persons performing an act demonstrating such an involvement in the affairs of a foreign country as to be inconsistent with the retention of American citizenship is to place a clear and definable limit on Congressional power. But to say, as the Government urges, that a person may be expatriated if to do so helps overcome diplomatic or administrative difficulties gives Congress an almost unrestricted power to expatriate. It would make citizenship a right Congress can take away as readily as the right to engage in a particular type of business. It would mean giving Congress the power to regulate the activities of citizens by holding over them the threat of expatriation. It would make the citizen the creature of the State, a situation which is the very antithesis of free government.

II. The Challenged Legislation Cannot Be Sustained on the Unwarranted Assumption That Naturalized Citizens, as a Class, Are More Likely Than the Native-Born to Abandon Their Allegiance

The Government, apparently recognizing that under *Perez*, mere residence abroad, could not be made an expatriating act, makes the following untenable argument. It urges that this legislation can be sustained

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did not apply equally to naturalized and native-born citizens. His remark that "No doubt" foreign residence might be a ground for expatriation if equally applied to native-born and naturalized was a concession purely *arguendo* designed to emphasize his principal point that the discrimination here complained of is unconstitutional

We share the Government's respect for the views of Judge Edgerton and, unlike them, we are willing to extend our regard to the point accepting his conclusions.

under this Court's ruling in *Perez* because Congress could have reasonably concluded that

> "a naturalized citizen's returning to reside permanently in the country of his origin shows not only a lack of allegiance to this country, but the reestablishment of a relationship with another country that is inconsistent with American citizenship." (Br. 42)

We submit that there is plainly no rational basis for such a conclusion. Residence by a naturalized citizen in the country of his origin may be and often is for purposes consistent with continued allegiance to the United States. That residence abroad is not always inconsistent with American citizenship is plainly obvious from the facts of this case. The fact that petitioner married a citizen of a foreign country and resides abroad in the country where her husband practices his profession clearly cannot be said to mean that petitioner has abandoned her allegiance to the United States. This is highlighted by the fact that native-born American girls are not regarded as lacking in allegiance if they marry foreign nationals and live with them abroad the rest of their lives.

Underlying this argument, as indeed many of the other contentions the Government makes in its brief, is the assumption that naturalized citizens as a class are less loyal than the native-born, and therefore more likely to abandon their allegiance to the United States.

Counsel for the Government goes so far as to suggest that naturalized citizens are more likely to commit acts such as espionage than are the native-born (Br. 31-32). This unworthy attack, not referred to in the legislative history and concededly not mentioned in

diplomatic correspondence (Br. 31),* is a sign of the length to which Government counsel is driven to find a rationale for this legislation.

The Government denies on one hand that the classification is invidious yet it seeks to sustain the legislation on the obviously invidious ground that naturalized citizens *as a class* are more likely to abandon their allegiance to the United States. This, we submit, is as odious or as unconstitutional as saying that because one racial group is believed by the Congress to have *as a class* a lower educational level than another, that all members of the group may be denied admittance to a state university. If classifications of this character are permitted, then Congress could just as easily say that because it thinks naturalized citizens are more likely to be disloyal than the native-born, naturalized citizens will not be issued a passport, while native-born citizens may travel freely.

In the first place, this slur on the loyalty of naturalized citizens which permeates the Government's entire brief is completely unwarranted and not supported by any facts. In addition, it is completely contrary to the constitutional requirements of due process.

Congress, under certain circumstances, may attach to a particular *act* connoting lack of allegiance the consequence of expatriation. But Congress may never enact legislation to restrict a group of citizens on a discriminatory basis on the theory that one group of citizens—*as a group*—are more likely to lack allegiance to the United States than another.

Such group legislation, particularly when based on national origin, is simply not permitted by the Constitution. Such group legislation may of course be

* The abbreviation "Br." refers to Respondent's Brief.

more simple to administer. But our Constitution, protects personal rights and does not allow Congress or the Government the administrative convenience of such legislation. Congress may not restrict the rights of a group of citizens on the basis of such factors as race, ancestry or national origin. Even if it were proved that such a group were more prone to involvement in certain problems than other groups, Congress must deal directly with the act which it considers evil and not with the group which it believes may be more likely to commit such an act. Otherwise it would no doubt be possible to justify many classifications between groups of citizens on a so-called "rational" basis. No doubt evidence could be presented showing that certain characteristics or propensities exist more among citizens of certain national origins than others. This, however, does not mean that Congress may base legislation on the basis of such factors. So far as Congress is concerned, such factors under our system of Government, are and must be completely irrelevant.[3]

The Congress has no power to segment and compartmentalize the citizenry and regulate them on the basis of assumed characteristics or tendencies of their race, religion, national origin or economic class. It must apply the same consequences to the same act whether or not, *a priori* or even on the basis of past conduct sub-

[3] The absurdities of the contrary approach here suggested by the Government are endless, *e.g.*, since experience teaches that those guilty of petty larceney are most often poor, and those guilty of violations of the antitrust laws are most often not poor presumably a rebuttable or conclusive presumption could be applied to persons charged with such crimes depending only on proof of their economic status. This would certainly eliminate administrative inconvenience and would avoid trials which are "cumbersome, long-drawn out and expensive to the Government." See note 5, *infra*.

stantiated by statistics, it was more likely to be committed by a Jew, a Catholic, a Negro or a naturalized citizen, or indeed a poor man or a rich man.

The Government indeed has been able to cite only a single case where this Court has upheld a discrimination based on a factor such as national origin. *Hirabayashi* v. *United States*, 320 U.S. 81. There the classification, as the Court expressly stated, was upheld only because of the existence of war and the imminent threat of invasion. In *Hirabayashi*, 320 U.S. at 100, this Court said:

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. . . . We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas."[4]

[4] The other cases cited in support of a classification such as made here involved classification between aliens and citizens or between aliens ineligible for citizenship and those eligible for citizenship and provide no basis for a classification of citizens.

The Government has omitted to mention a previous example of group legislation against a class of citizens whose reasoning coincides with that of the Government's brief. See *Plessy* v. *Ferguson*, 163 U.S. 537. One comment of the dissenting justice seems to us worth noting here:

> "Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the state require the separation in railroad coaches of native and naturalized citizens in the United States, or of Protestants and Roman Catholics?" *Id.*, 16, U.S. at 558.

The problems asserted to attend the residence abroad of naturalized citizens cannot be even remotely compared with the threat of imminent invasion. Yet short of such an imminent danger it is clear that the classification of persons on such a basis as foreign birth is prohibited under our Constitution.

In *Hirabayashi* the classification was permitted because due to the extreme exigencies of the situation there was no opportunity to separate those persons of Japanese ancestry likely to engage in sabotage and the vast majority who were loyal citizens. The State Department does, of course, have ample time and opportunity to distinguish between those citizens born or naturalized residing abroad who have abandoned their allegiance to the United States, and those who, like petitioner, are loyal Americans, and have never failed to perform in full their duties as American citizens.

No doubt, as the legislative history indicates, this process sometimes involves administrative difficulty, or if conducted by the courts judicial time and energy.[5] The protection of rights on a personal basis necessarily involves difficulties to the Government, but this is the business of a government of a free people.

In summary, Congress has no power to base expatriation on an act unless that act is inconsistent with American citizenship. Mere residence abroad clearly is not an act of this character. Nor can it be assumed:

[5] Indeed the Cabinet Committee considered having the function of taking away citizenship entrusted to the courts, but rejected this on the ground that "proceedings in the courts would be cumbersome, long drawn-out, and expensive to the Government . . ." (Nationality Laws of the United States (1938), part 1, House Committee Print, 76th Cong., 1st Sess., p. 70).

as the Government suggests, that residence abroad is such an act because some naturalized citizens who reside abroad may have in fact abandoned their allegiance to the United States. It is not appropriate as pointed out above to revoke the citizenship of those who have maintained their allegiance because others have not.

III. Congress May Not Impose Any Conditions Upon the Grant of Citizenship By Naturalization

The Government in an effort to find some Congressional power on which to base this legislation suggests that the discrimination between naturalized and native-born citizens can be justified on the theory that a naturalized citizen, because he acquired his rights of citizenship by naturalization, may be subject to restrictions and conditions not imposed on the native-born.

The Government refers to the following statement contained in the letter transmitting the report of the Cabinet Committee to the President.

> "The admission of an alien to the privilege of American citizenship is subject to the condition that he intend to reside permanently in the United States and perform the duties of a citizenship. When a naturalized citizen abandons his residence in the United States and takes up residence in the state of which he was formerly a native definite termination of his American citizenship should follow." (Hearings Before the Committee on Immigration and Naturalization, H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess. p. 409 1940), Nationality Laws of the United States (1939), part 1, House Committee Print, 76th Cong., 1st Sess., p. VII.)

Or as the Cabinet Committee stated even more plainly in its report:

> "... before an alien is admitted to the privilege of citizenship, under the laws of the United States, he is required to declare under oath that he intends to reside in the United States, and, if he fails to observe this obligation, he cannot complain of the withdrawal of the privilege granted." (Nationality Laws of the United States, *supra*, p. 70).

The Cabinet Committee apparently conceived of this legislation as an attack on the original naturalization. As such, the statute would, of course, raise a conclusive presumption of bad faith from acts occurring later and not contemplated or foreseeable at the time of naturalization. Sought to be sustained on such grounds, the legislation would be clearly arbitrary, as the facts of this case plainly show.[6] *Cf. Bailey* v. *Alabama*, 219 U.S. 219; *Tot* v. *United States*, 319 U.S. 463; *Heiner* v. *Donnan*, 285 U.S. 312.

The Government apparently, however, does not seek to sustain the legislation as an attack on the original naturalization. Rather it suggests that Congress could impose on naturalized citizens a residence requirement so that naturalized citizens, who take up residence abroad for reasons unforeseeable at the time of naturalization, would nevertheless lose their citizenship. The Government, with apparent approval, quotes a statement made by the United Kingdom delegate to an international Conference on the Elimination or

[6] Petitioner was naturalized at the age of 16 through the naturalization of her mother and met her husband only years later. Accordingly, at the time of her naturalization, she clearly could not have foreseen or intended that she would marry a German lawyer and take up residence in Germany.

Reduction of Future Statelessness to the effect that "the naturalized person was expected to justify his acquisition of nationality by a higher standard of behaviour . . ."[7] (Br. 47). This presupposes that naturalized citizens represent a class of citizens whom Congress may subject to requirements, restrictions and qualifications not imposed on the native-born.

The Constitution, however, does not empower Congress to create different classes of citizenship. Under the Constitution there is only one citizenship of the United States. Persons may, of course, acquire citizenship by different means. A person may be born a citizen of the United States, or obtain citizenship through naturalization. Congress may, of course, pass laws stating under what circumstances citizenship is acquired by birth (Section 301 of the Immigration and Nationality Act of 1952, 8 U.S.C., § 1401) and may, as the Constitution expressly provides, "establish a uniform Rule of Naturalization" (Constitution, Art. 1, Section 8, Cl. 4). A person who claims to be a native-born citizen may be denied the rights of citizenship and even deported upon judicial determination that his claim of citizenship is false. *Ng Fung Ho* v. *White*, 259 U.S. 276, 281-284. Similarly, the citizenship of a person who was naturalized by making a false statement on his application for naturalization may be revoked by judicial action. Section 340 (d) of the Act, 8 U.S.C. Section 1451(d), *Luria* v. *United States*, 231 U.S. 9.

However, once a person has validly become a citizen of the United States, be it by birth or by naturalization,

[7] Summary Record of the 15th Meeting of the Committee of the Whole, U.N. Conference on the Elimination or Reduction of Future Statelessness (U.N. 1961), p. 10.

his rights as a citizen are the same as those of every other citizen. Congress cannot create a class of citizens whose rights or obligations are greater or less than those of other citizens. This is the plain meaning which Chief Justice Marshall attached to the Constitution in his decision in *Osborn* v. *The Bank of the United States*, 22 U.S. (9 Wheat) 738, quoted on pages 23-24 of our principal brief. See also *United States* v. *Wong Kim Ark*, 169 U.S. 649 and *Luria* v. *United States*, *supra*. It is also clear from the plain language of the Fourteenth Amendment which provides for the citizenship of

> "All persons *born or naturalized* in the United States . . . ." (emphasis supplied).

It is not possible, therefore, to speak of naturalized citizens and native-born citizens as two classes of citizens. There are only citizens of the United States. The adjectives "naturalized" and "native-born" simply describe the method of acquisition of the status of a citizen.

The challenged legislation, therefore, cannot be sustained on the theory that Congress may impose a different or higher standard of behavior on naturalized citizens than it does on the native-born or to condition the grant of citizenship on the future performance of duties and obligations not imposed on citizens generally. If the statute were upheld on the theory that naturalized citizens are in effect citizens on probation subject to special regulations, then naturalized citizens would plainly be relegated to a second-class citizen status. Such a status would be contrary to the plain meaning and the spirit of the Constitution.

IV. The Legislation Cannot Be Sustained as an Exercise of the Foreign Affairs Power

The foregoing discussion places in perspective the Government's contention that the challenged legislation may be sustained as a means to solve problems attending the residence abroad of naturalized citizens.

We shall demonstrate furthermore that in no event is the legislation an appropriate means to deal with any problems attending the residence abroad of naturalized citizens.

As shown in our principal brief, this legislation could not be justified on this ground if actual problems thought to be created by the residence abroad of naturalized (or born) citizens could readily be dealt with by legislation of a more limited character.

The Government's brief fails to demonstrate such a need for this discriminatory and broadly restrictive legislation.

The Government urges that the legislation is an appropriate means to deal with foreign affairs problems caused by the residence of naturalized citizens in their country of origin—because of the fact that that was the country of which they were formerly citizens.

The Government, to justify the legislation on this ground, relies principally on the diplomatic history of the middle of the last century. The Government no doubt was required to reach so far back because the legislative history itself contains no specific references to cases where the United States was involved in international complications with foreign governments because of the residence abroad of naturalized citizens.

Nor presumably was the Government able to find such instances in more recent diplomatic history.

Congress in enacting this legislation did not consider this diplomatic history. It was not even mentioned in the legislative history. Indeed, even if these problems had been considered by Congress, they could not have formed a basis for this challenged legislation. As an analysis of the diplomatic history will show, the problems which were acute in the middle of the last century had been effectively solved by the time the challenged legislation was enacted, and Congress, in adopting this provision in 1940 had different things in mind.

Diplomatic History

There is no doubt, as the Government points out, that during the middle of the last century the United States had difficulties in providing protection for naturalized citizens while sojourning in the country of origin. This problem arose out of the unwillingness of many of the European countries to recognize American naturalization. These countries held to the old dogma that allegiance can not be cast off without the consent of the sovereign. "The most vexatious cases with which this Government had to deal were those where persons, natives of states of continental Europe which maintain large standing armies, came to the United States and were naturalized, and, upon return for pleasure or business to the country of their origin, were seized and drafted into the armed services." Van Dyne, *Citizenship of the United States*, 1904, pages 283-284. To such states naturalized citizens of the United States could not travel except at serious risk.

In 1868 Congress formulated into law the policy that a citizen had a right to expatriate himself, and that

the country of former nationality had no call upon a naturalized citizen's services. Act of July 27, 1868, 15 Stat. 224. This law declared that "the right of expatriation is a natural and inherent right of all people . . ." and provided in Section 2 that:

> "All naturalized citizens of the United States while in foreign countries are entitled to have and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens."[8]

"The immediate occasion which called forth the law was the arrest of certain naturalized citizens by their parent countries, chiefly the German states, for nonperformance of military service and numerous arrests of naturalized citizens of Irish origin in the United Kingdom charged with crimes of political character . . . Allowing for the heat occasioned by the nature of the arrests, the action of Congress . . . was taken with deliberation and with the unanimous agreement on the principle involved, and must be considered a final expression of national policy." Citizenship of the United States, Expatriation and Protection Abroad, House Doc. No. 326, 59th Cong., 2d Sess., pp. 10-11.

While United States policy that naturalized citizens should receive full protection was clear, the implementation of that policy was difficult in the light of the attitudes of some of the European countries. The United States attempted to resolve these difficulties by entering into naturalization treaties with some of the countries which were refusing to recognize American citizenship. These treaties are called the Bancroft treaties after the United States Minister to

[8] This provision is still the law, 22 U.S.C. § 1731.

Prussia who negotiated the first such treaty with the North German Federation in 1868. 15 Stat. 615. The purpose and background of this first such treaty appears clearly from a letter sent by Mr. Seward, the Secretary of State, to Mr. Bancroft, on August 22, 1867, 3 Moore *Digest of International Law* (1906), p. 358, where he states:

> "You are familiar with the never ending dispute between this Government and those European governments which claim to exact military service from persons born within their allegiance, but who have become naturalized citizens of the United States . . . It is in our intercourse with Prussia that the question produces the most serious inconveniences.
>
> "Soon after the close of our Civil War, Count Bismarck made some offers to the United States which were conceived in a spirit of great liberality. Your predecessor . . . was hopeful that through the negotiation thus opened, the two governments might arrive at a satisfactory conclusion of the question. It soon became apparent, however, that the United States could not surrender the principle of the absolute right of expatriation, while on the other hand Prussia was not prepared to acknowledge the principle in its full extent."

The Bancroft treaties effected a compromise between the claim of the United States that the naturalized citizens were only citizens of this country and the assertion of some of the European countries that these citizens could not escape their military obligations by acquiring American citizenship. The treaties made it safe for naturalized citizens to reside in their country of origin for a limited period of two years. After that they might become subject to the foreign power

and could have no assurance of protection on the part of the United States. This was clearly not an ideal solution, but a solution necessitated by the then existing circumstances. Furthermore, the Bancroft treaties did not automatically deprive citizens of their right to American citizenship upon residing for two years in the country of their origin, but only created a rebuttable presumption that a naturalized citizen who lived in his country of origin for that period intended to abandon his United States citizenship. 3 Moore's *International Law Digest* (1906), pp. 746-747, 748, 752.

These naturalization treaties clearly can provide no precedent for the withdrawal of citizenship under the challenged legislation. The treaties dealt with a situation presented by the refusal of a country to recognize American naturalization. The treaties secured for naturalized citizens the right to travel fully protected to his country of origin. This right apparently could only be secured, however, by this country agreeing not to claim as a citizen a person who resided there for a longer period. It is a completely different thing, as Section 352 does, to deprive naturalized citizens of their citizenship even though they reside in a country which recognizes American naturalization, as today nearly all countries do (including, of course, the Federal Republic of Germany where petitioner resides).

In 1906 and 1907 Congress passed legislation dealing with naturalized citizens. The Naturalization Act of 1906, 34 Stat. 596, made the intention to reside permanently in the United States a prerequisite for naturalization and established a rebuttable presumption that the naturalization of a person who established permanent residence in a foreign country within five years after his naturalization should be deemed fraudu-

lent and subject to revocation. The purpose of this statute was to assure that "some foreigner who does not intend to cast his lot permanently with us should endeavor to avail himself of the flag as a fraudulent protection." H.R. Rep. No. 6431, 59th Cong., 2d Sess., p. 2. This provision is still the law now contained in Section 340(d) of the Act, 8 U.S.C. § 1451(d). In the Act of March 2, 1907, 34 Stat. 1238, which is discussed on pages 25-26 of petitioner's principal brief, Congress set a time limit on the period in which the United States would provide diplomatic protection to a naturalized citizen who resided abroad. The Act provided that if a naturalized citizen resided abroad for certain periods a presumption would arise that he had voluntarily abandoned his citizenship. This Act, however, did not deprive the person of citizenship as such, but only of the right to protection. It had no application to the citizen who returned to the United States no matter how long he had stayed abroad. 28 Op. Attny. Gen. 504 (1910) Furthermore, the presumption could easily be rebutted by an expressed intent to remain a United States citizen. *United States v. Gay*, 264 U.S. 353. The 1907 Act was passed to implement the naturalization treaties and for considerations similar to those which led to the conclusion of those treaties.

Legislative History

In 1940 Congress enacted the challenged provision. If in 1940 there had been serious difficulties in securing the recognition of American naturalization, as there were in 1868, this provision then might, as the Government suggests, be some sort of development from the naturalization treaties and the earlier acts. The fact is, however, that the legislative history does not

indicate nor does the Government contend that in 1940 any such problem existed. Such problems were not even considered by Congress, nor could they be in any way a basis for the legislation. Congress is required to deal with current problems and not to cope with problems of past generations which have been solved and are of no present concern. The problems of the middle of the nineteenth century, such as the impressment of American citizens into foreign armies, are completely irrelevant to the question whether the challenged statute was an appropriate means to deal with current problems.

The legislative history indicates that Section 352 was enacted by Congress not because naturalized citizens residing abroad cause more problems than the native-born, but rather because it felt that any possible involvement in diplomatic problems on behalf of naturalized citizens residing abroad was not worthwhile because it believed many such naturalized citizens were only nominal citizens who had no attachment to the United States. A reading of the following portions of the legislative history quoted or cited by the Government in its brief makes this point perfectly clear.

Thus, for example, Chairman Dickstein of the House Committee said that the bill would

> "relieve this country of the responsibility of those who reside in foreign lands and *only claim citizenship when it serves their purpose.*" (86 Cong. Rec. 11944). (Emphasis supplied)[9]

[9] The Congressmen meant, of course, citizens who claimed rights, but refused responsibility. Of course, citizens who have not failed in their allegiance have a right to claim citizenship and the protection of the Government "when it serves their purpose."

The Senate report on the bill has stated (S. Rep. No. 2150, 76th Cong., 3d Sess., p. 4):

> "These provisions for loss of nationality by residence abroad would greatly lessen the task of the United States in protecting through the Department of State *nominal citizens* of this country who are abroad *but whose real interests, as shown by the conditions of their foreign stay, are not in this country.*" (Emphasis supplied)

Similarly, the Cabinet Committee Report, Nationality Laws of the United States, *supra*, p. 71, stated:

> "Needless to say, naturalized citizens who resume residence in the foreign lands from which they came are apt to renew old associations and ways of living and thinking, and thus become merged in the native population, losing, to a great degree, if not completely, their American character and feeling. This makes it all the more desirable that their American nationality, and not merely their right to the diplomatic protection of this Government, should be terminated."

Furthermore, the Cabinet Committee, which proposed the challenged legislation, cited thirteen cases as typical of the problems with which the statute should deal. Nationality Laws of the United States, *supra*, 72-75. None of these cases involved any alleged difficulties with foreign countries resulting from the fact that the naturalized citizen was residing in his country of origin. All of them were merely cases of protracted residence abroad, and most involved a breaking of all ties with this country. Some of the cases involved acts, such as serving in a foreign army, which are, of course, inconsistent with American citizenship.

That it was not the intention of Congress to deal with the specific foreign policy problems which may arise when a naturalized citizen resides in the country of his origin is also evident from the fact Congress also made residence in a foreign country other than the country of origin an expatriating act. (Section 352(a)(2)). The special problems to which the Government has referred which may arise when a naturalized citizen resides in the country of his origin have no applicability when a naturalized citizen is residing in a third country. The only possible theory which may be detected in the legislative history for making residence both in the country of origin and in another country an expatriating act is that naturalized citizens who take up residence abroad may be deemed to have no allegiance to the United States, while no such assumption is made with respect to the residence abroad of native-born citizens.

Accordingly, it is clear from the legislative history that Congress enacted the statute to deal with the problem of the "nominal citizen" who demands the advantages of American citizenship, including diplomatic protection, but whose real allegiance lies with a foreign country. It is on this basis that the challenged legislation must be judged. On this basis, however, it can not be sustained. As shown under II above, it would be unconstitutional because it assumes that all naturalized citizens living abroad as a class are "nominal citizens" while the native-born residing abroad are not, and because it operates to withdraw citizenship regardless of the allegiance of the individual naturalized citizen to which it applies.

As stated in more detail in our principal brief, p. 46, Congress was required to deal with actual problems

and to limit its measures to such as might be appropriate to deal with such problems. *Perez v. Brownell, supra; cf. Dean Milk Co. v. City of Madison*, 340 U.S. 349.

Unquestionably the person who resides abroad as an American citizen, but who has no allegiance to the United States, represents a problem with which Congress may deal. Congress to deal with this problem has attached expatriation to certain acts demonstrative of lack of allegiance to the United States whether they be performed by native-born or naturalized citizens. (Section 349 of the Act). Other similar measures may be possible. It is clear, however, that this problem cannot be dealt with by depriving naturalized citizens who reside abroad of their citizenship regardless of the allegiance to the United States on the theory that naturalized citizens who reside abroad may be assumed as a group not to have allegiance to the United States.

Furthermore, it is clear that the problem of the American citizen residing abroad who has in effect abandoned his allegiance to the United States is not one which is limited to naturalized citizens. Indeed, there is nothing in the legislative history to show that this is a problem which is more prevalent among naturalized citizens residing abroad than among native-born expatriates. That more such cases of naturalized citizens came to the attention of the State Department is simply because under the 1907 Act naturalized citizens residing abroad were required to show that they had not given up their allegiance to this country while no such requirement was imposed on the native-born.

Unable to find a justification for the legislation in more recent diplomatic history or in the legislative history of the Act, the Government posits certain theo-

retical problems which conceivably might attend the residence abroad of naturalized citizens. As we stated in our principal brief, this legislation affecting the right of citizenship could in no event be justified except if required to resolve urgent or pressing problems of a current nature. The mere theoretical possibility of a problem would not be enough to justify the legislation.

Indeed, counsel on behalf of the Secretary of State has tried hard to imagine problems which could exist with reference to naturalized citizens which do not exist with respect to born citizens. The Department itself, however, in its own operations has treated the matter in a way which belies the arguments made here on its behalf. For, contrary to the assumption that naturalized citizens residing abroad present problems different from the native-born citizen residing abroad, the Department of State which duly keeps a record of the number of American citizens residing abroad (over 670,000) was unable to supply us with any statistics as to the number of those persons who were born citizens and the number who were naturalized. Thus, in its operations the Department of State takes the position that it is concerned with how many American citizens are residing abroad and where they are residing, but that (except as the statute here involved requires it to be so concerned) it has no interest in whether the citizens residing abroad are born or naturalized. The practice of the State Department, as opposed to its arguments here, belies the suggestion basic to the Government's contentions here and indicates that naturalized citizens residing abroad present a problem no different in character from the problems presented by the residence abroad of born citizens.

Moreover, it is clear that the problems which the Government contends may attend the residence abroad of naturalized citizens are problems of a special and limited character. They are problems which can be dealt with by specific legislation without restricting the rights of naturalized citizens whose residence abroad does not present any foreign affairs problems different from the residence abroad of native-born citizens.

(a) The Government contends that when naturalized citizens reside in their country of origin, the foreign government is "likely to extract the performance of various obligations or services." (Br. 31) This country then, the Government says, will generally be called upon to intervene in one way or another and thus frictions from the foreign country are likely to result. (Br. 31) Such an eventuality could, we assume, apart from the problem of dual nationality, occur only if the foreign government fails to give full recognition to the American naturalization of its former citizen.

In our principal brief, p. 39, we stated that since the vast majority of countries, including Germany where petitioner resides, recognize American naturalization, this problem which applies to a very small number of naturalized citizens could easily be dealt with specifically without restricting the rights of many naturalized citizens who reside in countries which recognize American naturalization.

The Government does not dispute the fact that most countries recognize American naturalization. It states rather on page 36, note 29, of its brief that to limit this legislation to such countries which do not recognize such naturalization would make it dependent

> "upon the ever changing policies and laws of other countries; it would thus make a citizen's status perilously unpredictable and would impose what has been found to be a difficult administrative problem."

This, we submit, cannot justify depriving of his citizenship a naturalized citizen who resides in a country which clearly recognizes the naturalization. Where the basic personal right of citizenship is at stake, the Government must resolve the administrative problems involved by means other than depriving persons of fundamental rights in order to avoid considering the facts as they exist. Furthermore, it would hardly seem to be an undue burden on the State Department and its embassies and consulates throughout the world to keep advised of the laws and policies of various foreign countries on this point, particularly where this appears to be a problem in only a few countries. Nor would such more limited legislation make the status of the citizen unpredictable. The State Department could advise American citizens that a particular country fails to recognize American naturalization and that the citizen who does limit his stay must face certain consequences.[10]

b. The Government, to support the legislation as an exercise of the foreign affairs power, further argues that it is designed to reduce the occurrence of dual nationality. (Br. 33)

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[10] The Government also contends that such legislation "might well engender antagonisms with the isolated nations to which it had application, presenting a still further international complication." It seems to us far fetched that a nation which did not recognize American naturalization could be seriously antagonized by the State Department's conclusion that this was the case.

The Government states that some naturalized citizens are dual nationals, and some become dual nationals because of their residence in the country of their origin. Accordingly, by expatriating naturalized citizens who reside abroad, the number of dual nationals is reduced.

Dual nationality is, of course, not a problem limited to naturalized citizens. Many naturalized citizens are not dual nationals, and some native-born citizens are. Moreover, if Congress wants to deal with the problem of dual nationality, it can deal with that problem directly. This, in fact, has been done in Section 350 of the Act. Dual nationality, if necessary, can presumably be the subject of further legislation.

The Government also contends that the legislation will have the effect of reducing the number of dual nationals since naturalized citizens who reside abroad may have children who are dual nationals. Again, this is not a problem limited to naturalized citizens. If petitioner had been born in the United States, instead of naturalized, her children would also be dual nationals. The Government adds that it is probable that such children would have "stronger attachment to the foreign country of their birth and residence than to the United States." (Br. 34) The problem of children raised abroad is not one limited to children of naturalized citizens. If children who are raised abroad, and have never resided in the United States, present a problem this can be, and in fact is, the subject of other legislation. Petitioner's children, for example, would lose their American citizenship if they fail to come to the United States prior to the age of 23 to live here for at least 5 continuous years. Section 301(a)(7) of the Act, 8 U.S.C. § 1401(a)(7).

Finally, the Government argues, that Congress is not required to deal with the specific problems which may in certain circumstances attend the residence abroad of naturalized citizens, but that it may deal with naturalized citizens broadly. The Government relies on this Court's remark in *Perez* that Congress may deal with difficulties jeopardizing the successful conduct of international relations "on more than an *ad hoc* basis." 356 U.S. at 59.

In making this argument the Government ignores the obvious distinction between this case and *Perez*. The act involved in *Perez*, voting in a foreign political election, was one which by the majority of the Court deemed to be an act which was in and of itself likely to embarrass the United States. What the Court said in *Perez* is that where an act is of such a nature Congress was not required to limit the consequence of expatriation to those instances where the act actually causes difficulties in the conduct of foreign affairs. It did not say, as the Government apparently suggests, that the Congress did not have concern itself with whether or not the particular citizen committed the particular act and that, for example, Congress could expatriate all citizens residing abroad because some or many might vote in foreign elections.

Further residence abroad, is an act which in and of itself plainly does not embarrass the United States in the conduct of its foreign affairs. Such residence can cause difficulties only in certain special, definable situations, as perhaps where a state does not recognize American naturalization. The legislation therefore must be limited to those situations where the act of residence abroad is likely to cause difficulties. This is not dealing with the problem on an "ad hoc basis,"

but restricting the scope of the legislation so as to make it consistent with vital and fundamental notion of American citizenship and to keep it from being "inappropriate to the difficulties to be dealt with." *Perez* v. *Brownell*, 356 U.S. at 60.

CONCLUSION

Petitioner is entitled to a declaratory judgment stating that she continues to be a citizen of the United States.

Respectfully submitted,

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